



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-02-2

INTRODUCTION

You are a member of a regional planning agency ("Agency").^{1/} The Agency consists of both appointed and elected members. Although you were initially appointed to the Agency, you are currently an elected member.

During your tenure as a member of the Agency, you also were previously an uncompensated member of the Board of Directors of a non-profit organization ("Organization"). You resigned from the Organization's Board in order to avoid any potential conflicts of interest while your request for a legal opinion from the Commission was pending. You have remained a member of the Organization, but would like to resume a position on its Board.

QUESTION

If you resume a position on the Organization's Board, may you participate as an Agency member in particular matters before the Agency concerning a particular property (a proposed development), where the Organization has expended money to advocate a particular policy position (opposing the development), but where the Organization will hold no interest in the subject property, does not own any abutting property, and may engage in fundraising efforts to solicit charitable contributions to assist another entity to purchase the property?

ANSWER

If you resume a position on the Organization's Board, then, as a member of the Agency, you may not participate in any particular matters in which the Organization has a financial interest. Thus, the answer depends on whether, under the circumstances, the Organization has a financial interest in the particular matter before the Agency. Accordingly, if at the time that the particular matter is pending before the Agency, the Organization does not intend to expend any financial resources as a result of the Agency's decision, no financial interest will be present and you may participate. If the only expenditure by the Organization is for advocacy of a policy view during the public process prior to decision, there is no financial interest. In contrast, if at the time the particular matter is pending before the Agency, you know or, after reasonably inquiry, discover that as a result of the Agency's decision, the Organization intends to expend its financial resources to continue its opposition to the project or has made an offer to engage in fundraising efforts on behalf of a purchaser for the property, you may not participate because the Organization will be deemed to have a financial interest. Finally, if at the time the particular matter is pending before the Agency, after making a reasonable inquiry as to the intentions of the Organization, you learn that the Organization is truly undecided about its future course of action, you may participate.

FACTS

The Agency

The Agency was created by Legislative Act. The purpose of the Agency is "to further protect the health, safety, and general welfare of [regional] residents and visitors by preserving and conserving for the enjoyment of present and future generations the unique natural, historical, ecological, scientific, and cultural values of [the region] . . . by protecting these values from development and uses which would impair them, and by promoting the enhancement of sound local economies."^{2/}

One of the Agency's statutory responsibilities is to develop criteria and standards to determine when a development project will be considered a special development project and to review and approve all applications for special development projects.^{3/} Generally, special development projects ("SDP") are the types of developments "which, because of their magnitude or the magnitude of their effect on the surrounding environment, are likely to present development issues significant to more than one municipality of the [region]."^{4/}

In connection with proposals to develop property, the Agency is required to review all applications for development permits for SDPs, to hold a public hearing, and to make certain findings.^{5/} These findings include whether the probable benefits of the project outweigh the probable detriments, whether the proposed development will substantially or unreasonably interfere with the achievement of the objectives of the general plan of a municipality, and whether the proposed development is consistent with any municipal regulations.^{6/} Absent approval by the Agency, a municipality may not grant a development permit for an SDP.^{7/} The Agency may also specify conditions to be met by the developer in order to minimize any economic, social or environmental damage.^{8/} After an SDP is approved by the Agency, it is subject to further approvals by other entities, including local boards.

The Organization

The Organization was established as a non-profit, tax-exempt organization. It is dedicated to protecting the environment of the region through land preservation and conservation by education and advocacy. The Organization works with landowners, other environmental organizations, and public officials to conserve land, monitor growth and development, promote environmental awareness, encourage public participation, and advocate on behalf of the natural resources of the region.

The Organization receives money in various ways to support its advocacy work and general program implementation. First, each member makes an annual contribution. Second, it relies on funds donated to it by the public who oppose a development or who want to reimburse the Organization for a successful conservation advocacy program. The Organization does not use paid fundraisers. Instead, the Board members or its paid staff engage in fundraising as part of their normal job responsibilities.

The Organization frequently advocates for the purchase of land or of a conservation restriction by a governmental or non-profit entity. In connection with its land preservation program, the Organization raises funds as part of a financing package^{9/} to assist others in making a purchase. Although its Articles of Organization allow it to purchase land or conservation easements, the Organization generally does not do so because its primary role is to advocate for land preservation.

The Developer

A developer ("Developer") submitted an SDP to the Agency seeking approval for a proposed development ("Project"). The Organization advocated denial of the application on policy grounds, and that instead, the regional land bank or another conservation entity purchase the property in order to prevent its development and preserve it as open public space. As part of its opposition and advocacy efforts, the Organization also expressed a willingness to engage in fundraising on behalf of another non-profit organization or governmental entity for its purchase of the property as public conservation land, if such an opportunity were to present itself in the future.^{10/}

In connection with its opposition to the Developer's application, the Organization expended money for expert consultants, attorneys fees, and related costs. It also submitted opposition testimony to the Agency relating to the proposed Project.^{11/} For the approximately eight month period after the SDP was filed, the Organization expended funds for consultants, attorneys fees, and related costs in opposing the Developer's proposal. The funding for its opposition came from the general, unrestricted funds of the Organization. There was no segregated special fund for the Project, although the Organization separately tracked expenses as well as contributions earmarked for the opposition.^{12/}

You submitted a written disclosure to your appointing authority relating to your Board membership on the Organization. Thereafter, the Agency rejected the SDP. The Agency voted a second time^{13/} and again, it rejected the SDP.^{14/}

The Developer then initiated a statutory appeal in Superior Court. Pursuant to an order of remand, the Developer filed a revised plan containing a number of significant changes. The Agency has treated this SDP as a new submission.

In connection with the new SDP, the Organization retained the services of an expert who reviewed the materials submitted by the applicant and offered testimony at the public hearing. The Organization also retained the services of a law firm, and through the firm, retained a consultant and an expert. It expended funds on consulting services relating to the new SDP.

Several hearings were held on the new SDP. The public testimony record was closed, with the Agency's deliberation and action currently pending. No public input is received during deliberation.

If the application is approved, the Organization will evaluate what action it would take, including taking no action. It will consider the conditions in the approval as well as the applicant's actions. For example, if the Agency approves the SDP with conditions that the

applicant deems too severe, the applicant may appeal the Agency's decision. The Organization may then seek to participate as a party in the appeal or as an *amicus*.

You state that, at this time, the Organization has no plans to participate in fundraising. If an appropriate conservation purchaser, such as the municipality, a land trust or a state agency, were to request assistance from the Organization in fundraising for the purchase of the property, the Organization's Board would consider the request. The Organization will take no affirmative steps to make an offer to help with fundraising in the absence of a request by an appropriate entity seeking to purchase the property. Only if a legitimate plan for conserving the land were presented and a request was made to the Organization's Board to assist (for example, by coordinating a private fundraising component to the financing package) would the Organization even consider providing assistance or fundraising. The Organization's Board has not made any effort to find a buyer for the property since the filing of the new SDP.

DISCUSSION

For the purposes of the conflict of interest law, G.L. c. 268A, the Agency is a municipal agency.^{15/} As a member of the Agency, you are a municipal employee^{16/} within G.L. c. 268A and, as such, you are subject to its provisions. In particular, for the purposes of this discussion, you are subject to §§ 19 and 23 of the statute.

Section 19

Section 19(a) provides in pertinent part that a municipal employee may not participate^{17/} in a particular matter^{18/} in which to his knowledge, a business organization in which he is serving as a director has a financial interest. "The objective of [§ 19] is to eliminate in advance the pressure that otherwise might be brought to bear on public employees when faced with situations where there are competing public and private considerations."^{19/} The essence of § 19 is its assurance to the public that a public employee's official judgments and actions "will not be clouded by potentially competing private [financial] interests."^{20/}

As a non-profit organization, the Organization is a business organization within the meaning of § 19 and as a Board member, you would be a director of the organization.^{21/} The new SDP submitted by the Developer is a particular matter. Your activities as an Agency member, such as reviewing the SDP, conducting hearings and engaging in deliberations, would constitute participation in that particular matter. However, the prohibition on participation under § 19 arises only if there is a financial interest in the particular matter.^{22/} Accordingly, the relevant inquiry is whether the Organization has a financial interest in the Project related particular matters before the Agency such as the new SDP.

The conflict of interest law does not define the term financial interest. Courts have identified the lack of a definition as a deficiency in the statute.^{23/} The Commission has been charged with the responsibility for interpreting the term and giving it a workable meaning.^{24/}

Despite the absence of a definition, the Commission has a long-standing practice of interpreting the phrase as meaning a financial interest of any size,^{25/} either positive or negative,^{26/} as long as it is direct and immediate or reasonably foreseeable.^{27/} The term financial interest, however, does not include financial interests that are "remote, speculative, or not sufficiently identifiable."^{28/}

In construing § 19, the Commission determines in the first instance if the interest at issue can be quantified in monetary terms.^{29/} If so, the Commission then applies a

reasonable foreseeability test^{30/} on a case by case basis.^{31/} If such a financial interest is reasonably foreseeable, then § 19 will prohibit participation.

Applying these principles to your situation, you may participate in the new SDP if at the time you participate, the Organization does not intend to spend any additional financial resources in relation to the Project, whatever decision the Agency makes.^{32/} In such case, a reasonably foreseeable financial interest is absent because the Agency's decision will have no affect, either positive or negative, on the financial resources of the Organization.

An argument could be made that the Organization has a financial interest in the Developer's matter due solely to its past expenditures in opposition to the development and regardless of its intent concerning future opposition activities. That is, because the Agency approval of the development would render those Organization expenditures a waste, the Organization has a financial interest in the Agency's vote. The Commission, however, declines to read the term "financial interest" so broadly. This is particularly true where it appears that the Organization's prior expenditures on the Developer's matter were in support of the presentation of the Organization's position on issues of public policy during the Agency's hearing process on the Project and not in defense or advancement of the Organization's or its members' private property interests.^{33/}

In contrast, under § 19, you may not participate if at the time the matter is pending, the Organization intends, if the SDP is approved, to expend additional financial resources in an effort to continue its opposition to the Project. For example, the Organization may intend to continue its opposition efforts by spending money to mount an appeal of the decision as either a party or as an *amicus*, or to continue the fight before other local boards.^{34/} In addition, the Organization may intend to spend money in connection with fundraising efforts to assist a prospective purchaser^{35/} of the property.^{36/} In each of these circumstances, if the SDP is approved, then the Organization would expend its financial resources. Therefore, the Agency's decision would have a reasonably foreseeable effect on the financial interests of the Organization. Your knowledge of these reasonably foreseeable expenditures by the Organization would subject you, as an Agency member participating in the consideration of the SDP, to precisely the kind of pressure of competing public and private interests that ' 19 was intended to eliminate. Accordingly, under such circumstances, you would be required under ' 19 to abstain from participating as an Agency member in the Developer's SDP.^{37/}

Finally, in the event the Organization is, at the time when the Developer's SDP comes before the Agency, undecided about its future course of action should the Agency approve the SDP, ' 19 will not bar your participation in that matter as an Agency member. This indecision and lack of intent to further oppose the Project must be *bona fide*.

As an Agency member subject to c. 268A, you have a duty to make reasonable inquiry into the intentions of the Organization.^{38/} Failure to make such inquiry constitutes willful blindness. "If a person confronted with a state of facts closes his eyes in order that he may not see that which would be visible and therefore known to him if he looked, he is chargeable with "knowledge" of what he would have seen had he looked."^{39/}

Accordingly, in determining the intent of the Organization regarding any future efforts and expenditures in opposition to the Project or any other SDP, you may not simply rely on the absence of the Organization's formal vote or a plan of action concerning its continued opposition to the Project and expenditures in support of that opposition. Instead, you must make a reasonable effort to determine whether there is actual agreement or disagreement among the persons controlling the Organization (*e.g.*, the Organization's directors) regarding whether the Organization is more likely than not to continue to oppose the Project if the SDP is approved. In order to satisfy your duty of reasonable inquiry, you must review and consider all factors relevant to the Organization's intentions, including its past history in connection with opposing similar projects. If you have made such a reasonable inquiry into the intentions of the Organization, however, and have determined that it is truly undecided about its future course of action, § 19 would not bar your participation as an Agency member in the Developer's matter.

In reaching its conclusions, the Commission has considered and rejected each of the arguments you have made to support your contention that neither you nor the Organization has a financial interest in the SDP submitted by the Developer. Your principal argument is that the Organization's promise to assist in fundraising for any entity interested in purchasing the property for conservation purposes does not constitute a direct financial interest in the Developer's proposal.^{40/}

Your arguments, however, do not address the financial interest that the Organization may have in the Project or other SDP as a result of anticipated future monetary or in kind expenditures to continue its opposition to the new SDP should it be approved by the Agency or in any event, to locate and/or assist a purchaser. Contrary to your argument, if the Organization is likely to have future expenditures, then the Organization will either receive a benefit or be harmed financially as a result of the approval or disapproval of the SDP. The benefit will come in the form of saving funds should the Agency deny the application. The harm will come in having to spend money to continue opposing the Project either before other local boards or in connection with a court challenge to the Agency's decision or locating and/or assisting a purchaser.

Section 23

Section 23(b)(3) provides in relevant part that a municipal employee may not act in a manner which would cause a reasonable person having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of position or undue influence of any party or person. The provision "is concerned with the appearance of a conflict of interest as viewed by the reasonable person, not whether the [municipal employee] actually gave preferential treatment" and is focused on the perceptions of the community's citizens.^{41/}

In order to dispel the appearance of a conflict, § 23(b)(3) requires that a public official make a full disclosure of all the relevant facts in a manner that is public in nature. This disclosure, which is a public record, serves to let the public know the relevant facts.

As applied to your situation, if the Organization does not have a financial interest under § 19 as set forth above because it does not intend to expend any additional financial resources to continue its opposition efforts or to assist a purchaser or is truly undecided about its future course of action, you will nonetheless have an appearance of a conflict because the Organization has spent money on the particular matter. Accordingly, you must make a § 23(b)(3) disclosure detailing in full all of the relevant circumstances prior to taking action as an Agency member concerning the matter.

Your disclosure of the relevant circumstances must be full and complete and must include a description of all relevant expenditures and activities of the Organization relating to the matter of which you have knowledge. Any such expenditures and activities must be described in detail and itemized by category and amount. In addition, your disclosure should include a description of the Organization's past history of advocacy and/or opposition relating to the same or similar types of developments.

Your disclosure should be filed with the Agency's Executive Director and with the clerk for the municipality that referred the application to the Agency. You should also make a verbal disclosure for inclusion in the meeting minutes prior to taking any official action.

Section 23 requires you to base any decisions on the merits, using objective standards and following all requisite procedures. If you are unable to judge the matter impartially, you should abstain.

In conclusion, if you become an Organization Board member and if the Organization has a financial interest in the new SDP or any other matter pending before the Agency as described above, as an Agency member, you will be prohibited from participating. You may participate only if, after reasonable inquiry, you know of no financial interest or the Organization is truly undecided regarding future expenditures as a result of the Agency's decision. Finally, if there is no financial interest, but the Organization has advocated a policy position to the Agency, you must file a full § 23(b)(3) disclosure.^{42/}

DATE AUTHORIZED: January 31, 2002

^{1/} You also serve as the Agency's Hearing Officer and head a Subcommittee.

^{2/} Legislative Act.

^{3/} *Id.*

^{4/} *Id.*

^{5/} *Id.*

^{6/} *Id.*

^{7/} *Id.*

^{8/} *Id.*

^{9/} The financing packages can include funds from individuals, local, state and federal governmental entities, as well as public and private foundations.

^{10/} For the purposes of this opinion, you have asked the Commission to assume that the Organization will not own the property or hold a conservation easement or any other interest in the Developer's property. In addition, you have asked the Commission to assume that you and your family members do not have a personal financial interest in the Developer's property.

^{11/} The Organization routinely submits SDP testimony as part of its land conservation and advocacy mission, sometimes with the assistance of legal and technical experts, some of whom are paid and some of whom are volunteers.

^{12/} The Organization spent far in excess of the earmarked donations in connection with its opposition to various proposals, including the Project.

^{13/} You and another Agency member did not participate in the second vote citing possible conflicts of interest.

^{14/} In light of the Agency's rejection of the original SDP, the Organization did not engage in any fundraising efforts to purchase the Developer's property. The Organization's Board took no formal action to pursue any fundraising because there was never an opportunity to purchase the property. The Organization's Board and staff did not make any effort to find a buyer for the property. No purchaser of the property was ever identified.

^{15/} A municipal agency is "any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." G.L. c. 268A, § 1(f). The Agency is a regional municipal entity and, as such, its members are municipal employees of each member municipality for purposes of the conflict of interest law. *EC-COI-99-5; 92-26.*

^{16/} A municipal employee is defined as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis." G.L. c. 268A, § 1(g).

^{17/} Participate is defined as "participate in agency action or in a particular matter personally and substantially as a . . . municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G.L. c. 268A, § 1(j). Participation also includes "formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations, as well as deciding and voting on particular matters." *EC-COI-97-3; EC-COI-92-30.*

^{18/} Particular matter is defined as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, § 1(k).

^{19/} *EC-COI-84-98* (citing Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 301 (1965)).

^{20/} *EC-COI-86-13*.

^{21/} *EC-COI-88-4*.

^{22/} *EC-COI-84-98* (§ 19(a) triggered by existence of any financial interest).

^{23/} *Graham v. McGrail*, 370 Mass. 133, 138 (1976); *Moskow v. Boston Redevelopment Authority*, 349 Mass. 553, 567 (1965), *cert. denied*, 382 U.S. 983 (1966).

^{24/} *EC-COI-84-98*.

^{25/} *Id.* (term not limited to financial interests that are significant or substantial); *EC-COI-89-33*.

^{26/} *EC-COI-89-33*.

^{27/} *EC-COI-97-3*; *96-2*; *92-4*; *90-2*; *89-33*; *89-19*; *87-16*; *84-98*.

^{28/} *EC-COI-90-02*; *89-19*; *87-16*. The Commission's interpretation of § 19 is similar to that given to its federal analog, 18 U.S.C. § 208. *See EC-COI-98-1* (Ethics Commission looks to federal statute for guidance). Under § 208(a), a federal employee is prohibited from personally and substantially participating "if the particular matter will have a direct and predictable effect" on the organization's financial interest, which effect exists "if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest." 5 C.F.R. § 2635.402(a), (b)(1)(i) (2001). "[I]f the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to the matter," there is no direct and predictable effect. *Id.* § 2635.402(b)(1)(i). "A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest." *Id.* § 2635.402(b)(1)(ii). *See 83 OGE 1* (January 7, 1983).

^{29/} *EC-COI-89-33*.

^{30/} *EC-COI-90-14*.

^{31/} *EC-COI-89-33*.

^{32/} This includes the situation where the Organization has spent all the money that it intends to spend in connection with its advocacy efforts before the Agency. The intent to not expend any

further financial resources may arise from a decision by the Organization to that effect or an inability to do so because of lack of funds.

^{33/} It should be noted, however, that were the Organization to have or establish a pattern or practice of continuing to make expenditures in opposition to a proposed project after its approval by the Agency whenever it had taken a position in opposition to the project before the Agency, the Commission would conclude that the Organization has a reasonably foreseeable financial interest in the project for § 19 purposes.

^{34/} In this situation, expenditures may be made for, among other things, retaining consultants and attorneys or preparing written materials and reports.

^{35/} A reasonably foreseeable financial interest would be present if the Organization will spend money to locate a potential purchaser or to assist a purchaser, if such assistance would require the Organization to spend money in its fundraising efforts for items such as postage, photocopying, written distribution of appeals for money, as well as the time of its paid staff members.

^{36/} You state that the Organization has no plans to participate in fundraising for the purchase of the Developer's property. The Organization's Board would consider fundraising if and only if a legitimate plan for conserving the land was presented by an appropriate conservation purchaser and a request was made to the Organization's Board for fundraising assistance.

^{37/} "Ordinarily, the wise course for one who is disqualified from all participation in a matter is to leave the room." *Graham v. McGrail*, 370 Mass. 133, 138 (1976).

^{38/} *In re Montalbano*, 2000 SEC 969 (§ 19 applicable to public official who "closed her eyes" to the facts that would have informed her of the conflicts).

^{39/} *Demoulas v. Demoulas*, 428 Mass. 555, 577 (1998) (citing *West's Case*, 313 Mass. 146, 151 (1943) (quoting *Zdunek v. Thomas*, 215 Mass. 11, 15 (1934))).

^{40/} You also make two additional arguments. First, you argue that the interest of the Organization is shared with the general public and therefore, is not a financial interest within the meaning of § 19. Section 19(b)(3) provides that no violation will occur if the particular matter involves a determination of general policy. The exemption set forth in § 19(b)(3) requires that the shared interest must be one of either the municipal employee or the members of his immediate family, not one shared by a business organization in which he is a director. Moreover, the interest involves the expenditure of financial resources by the Organization which is not shared by the public. Your other argument alleging restrictions on free speech prohibited by Amendment Article 76 of the Massachusetts Constitution and the First Amendment is equally unavailing. This argument was previously rejected by the Supreme Judicial Court. *Zora v. State Ethics Commission*, 415 Mass. 640, 651 (1993) ("The State conflict of interest law restricts conduct, not speech or expression. . . . Any incidental limitation of First Amendment freedoms The Commission understands that you filed a § 23(b)(3) disclosure as advised by the Legal Division.

⁴⁰ is clearly justified by the Commonwealth's substantial interest in regulating the conduct of public officials.").

^{41/} *In re Hebert*, 1996 SEC 800.

^{42/} You have previously been advised informally by the Commission's Legal Division about your ability as an Agency member to participate in the new SDP while you are a member of the Organization and that payment of your annual membership dues alone is not considered to be a financial interest within § 19. The Commission understands that you filed a § 23(b)(3) disclosure as advised by the Legal Division.